In the United States Court of Appeals
For the Eleventh Circuit

Case No. 24-10265-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant,

v.

PEGGY PROFFITT
Defendant Appellee.

(District Court No. 1:23-00210-KD-N)

Case No. 24-10264-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE
FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant,

v.

JOHNNY HILL and LISA JO ANN BOUTWELL
Defendants-Appellees.

(District Court No. 1:23-00221-KD-N)

On Appeal from the United States District Court for the Southern District of Alabama Southern Division

BRIEF OF *AMICI CURIAE* THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEES

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Case No. 24-10264-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE FOR THE COUTHERN DISTRICT OF ALABAMA

Plaintiff-Appellant

v.

JOHNNY HILL and LISA JO ANN BOUTWELL

Defendants-Appellees

(DISTRICT COURT NO. 1:23-00221-KD-N)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1) Appellant is an individual.

2) Appellee is an individual.

3) Amici curiae certifies that the following individuals/entities may have an interest in the outcome of this matter:

a. Boutwell, Lisa Jo Ann – Debtor-Defendant / Appellee in Case No. 24-10264-A;

b. Callaway, Hon. Henry A. – United States Bankruptcy Judge for the Southern District of Alabama;

c. Conte, Christopher T. – Chapter 13 Trustee / Plaintiff / Appellant in Case No. 24-10264-A & 24-10265-A;

d. DuBose, Hon. Kristi K. – United States District Judge for the Southern District of Alabama;

e. Friedman, Barry – Attorney for Special Counsel for Debtor / Appellee Lisa Boutwell (Long & Long PC);

f. Hartley, Jeffrey – Counsel to Plaintiff / Appellant (Helmsing Leach Herlong Newman & Rouse, PC);

g. Hill, Johnny Brackston – Debtor-Defendant / Appellee in Case No. 24-10264-A;

h. Long & Long, PC – Special Counsel for Debtor / Appellee Lisa Boutwell;

i. Mayer, Thomas Moers – Counsel to Amici curiae (Kramer Levin Naftalis & Frankel LLP);

j. National Association of Consumer Bankruptcy Attorneys – Amicus curiae;

k. National Consumer Bankruptcy Rights Center – Amicus curiae;

l. Padgett, Herman D. – Counsel to Defendants / Appellees;

m. Robertson, Lacy S. – Counsel to Proffitt-Defendants / Appellees;

n. Watts, William W. III – Counsel to Plaintiff / Appellant (Helmsing Leach Herlong Newman & Rouse, PC); and

o. Zimlich, Mark – Bankruptcy Administrator for the Southern District of Alabama.

CASE NO. 24-10265-A

CHRISTOPHER T. CONTE, STANDING CHAPTER 13 TRUSTEE FOR THE SOUTHERN DISTRICT OF ALABAMA
Plaintiff-Appellant
v.
PEGGY PROFFITT
Defendant-Appellee

(District Court No. 1:23-00219-KD-N)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1) Appellant is an individual.

2) Appellee is an individual.

3) Amici curiae certifies that the following individuals/entities may have an interest in the outcome of this matter:

a. Callaway, Hon. Henry A. – United States Bankruptcy Judge for the Southern District of Alabama;

b. Conte, Christopher T. – Chapter 13 Trustee / Plaintiff / Appellant in Case No. 24-10264-A & 24-10265-A;

c. DuBose, Hon. Kristi K. – United States District Judge for the Southern District of Alabama;

d. Hartley, Jeffrey – Counsel to Plaintiff / Appellant (Helmsing Leach Herlong Newman & Rouse, PC);

e. Mayer, Thomas Moers – Counsel to Amici curiae (Kramer Levin Naftalis & Frankel LLP);

f. Moore, Matthew Eugene – Counsel to Appellee – Proffitt (Padgett & Robertson);

g. National Association of Consumer Bankruptcy Attorneys – Amicus curiae;

h. National Consumer Bankruptcy Rights Center – Amicus curiae;

i. Padgett, Herman D. – Counsel to Defendants / Appellees;

j. Proffitt, Peggy – Defendant / Debtor Appellee in Case No. 24-10265-A;

k. Robertson, Lacy S. – Counsel to Proffitt-Defendants / Appellees;

l. Steele, Jason K. – Special counsel for Debtor / Appellee Peggy Proffitt;

m. Watts, William W. III – Counsel to Plaintiff / Appellant (Helmsing Leach Herlong Newman & Rouse, PC); and

n. Zimlich, Mark – Bankruptcy Administrator for the Southern District of Alabama.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1500 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The National Consumer Bankruptcy Rights Center ("NCBRC") is a non-profit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. To those ends, it provides assistance to consumer debtors and their counsel in cases likely to have a material impact on consumer bankruptcy law. Among other things, it submits *amicus curiae* briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* certify that no person or entity, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

AMICI'S STATEMENT OF ISSUES ON APPEAL

Did the District Court err in holding that Section 1329(a) of the Bankruptcy Code[1], which provides that Appellees' plans ***may*** be modified, commits modification to the Bankruptcy Court's discretion in determining that each Appellee's insurance settlement did not increase her ability to pay unsecured creditors under her chapter 13 plan?[2]

Did the District Court err in affirming the Bankruptcy Court's exercise of discretion in finding that each Appellee's insurance settlements did not increase her ability to pay unsecured creditors under her chapter 13 plan?

STANDARD OF REVIEW

The District Court's holding that plan modification is subject to the discretion of the Bankruptcy Court in determining each Appellee's ability to pay unsecured creditors under her chapter 13 plan is a ruling of law, subject to *de novo* review.

[1] 11 U.S.C. § 1329(a). All chapter and Section citations are to Sections and chapters of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. unless otherwise indicated.

[2] Amici use the singular female pronoun to refer to Peggy Proffitt as sole debtor in her chapter 13 case and to Johnny Hill and Lisa Ann Boutwell (the "Boutwell-Appellees") collectively as joint debtors in their chapter 13 case, except where the context requires reference to Mr. Hill.

The Bankruptcy Court's exercise of discretion in denying Appellant's motions was subject to review for abuse of discretion in the District Court and before this Court.

INTRODUCTION

Appellee Peggy Proffitt had an accident after confirming her chapter 13 plan; she received $7,685.39 under an insurance settlement. *See* Appendix of Appellant; Dkt. No. 16 at 95. Appellee Lisa Jo Ann Boutwell had an accident after she and her husband Johnny Hill confirmed their chapter 13 plan; she received $19,685.61 under an insurance settlement. *Id.*

Christopher T. Conte, the standing chapter 13 trustee and Appellant herein, in 2023 moved to modify Appellees' chapter 13 plans to increase payments to unsecured creditors – in Proffitt's case, from 62.19% to 76.86%, and in the Boutwell Appellees' case, from 40.25% to 77.07%, the increase in each case to be funded from the respective debtor's post-confirmation insurance settlements. *See id.* at 15, 95-96.

With respect to the Boutwell-Appellees' case, Appellant offered as evidence a stipulation setting forth the amounts of the respective insurance settlements. *Id.* at 15; 19. In its 2023 motion and briefs, Appellant referred to the schedules of assets and liabilities, and statements of income, that the Boutwell-Appellees had filed in their chapter 13 cases in 2018. *Id.* at 19-20. Appellant noted that the Boutwell-

Appellees had not amended their 5-year-old schedules to reflect a change in their assets and liabilities; otherwise, Appellant offered no evidence as to the 2023 value of assets reported in 2018. *Id.* at 18-20.

At a hearing on May 12, 2023, the Bankruptcy Court took extensive testimony by Ms. Proffitt and Ms. Boutwell and made findings of fact, not challenged on appeal, that each debtor was living "paycheck to paycheck" and were "paying all of their net disposable income into their chapter 13 cases." *Id.* at 35, 49, 94, 108. The Bankruptcy Court also found that Ms. Boutwell and her husband had only one working vehicle (she testified as to their need for two) after her husband had an accident in their other vehicle. *Id.* at 94. Finally, the Bankruptcy Court found that Ms. Boutwell "had to borrow $3,500 from her parents while [her husband] took off work to care for her after her accident." *Id.*

Appellant argued that the insurance settlements increased both the liquidation value of the Appellees' estates and the disposable income of each Appellee, which Appellant argued must be distributed to creditors under Sections 1325(a)(4) and 1325(b). *Id.* at 98.

The Bankruptcy Court denied Appellant's motions to modify the plan, holding that Section 1325(a)(4)'s less-than-liquidation test (also known as the "best interests of creditors test") applied to property as of the effective date of the plan, which did not include the insurance settlements. *Id.* at 92, 98-99. The Bankruptcy Court held

that the insurance settlements did not constitute disposable income and therefore Section 1325(b) did not apply. *Id.* at 99.

The District Court disagreed, holding that the best interests test applied to property as of the effective date of the *modified* plan, including the insurance settlements. *Id.* at 266. The District Court held that insurance settlements constituted income if they increased an Appellee's ability to pay. *Id.* at 267. The District Court nevertheless affirmed on the ground that Section 1329 remitted the decision to modify to the discretion of the Bankruptcy Court and the Bankruptcy Court had not abused its discretion based on testimony that the insurance settlements did not substantially improve the Appellees' financial condition and did not increase their ability to make payments to creditors. *Id.* at 269-70

These appeals followed.

ARGUMENT

Appellant argues that Sections 1325(a)(4) and 1325(b) compel modification of Appellees' plans because the insurance settlements increased both the liquidation value of each Appellee's estate and the disposable income available to each Appellee to pay unsecured creditors.

Appellant's arguments fail as a matter of law and as matter of fact.

As a matter of law, this Court has held that that a chapter 13 plan may be modified based on an increase or decrease in the debtor's ability to pay as determined

in the discretion of the Bankruptcy Court, not because Section 1325(a)(4) or Section 1325(b) applies. Section 1325(a)(4) requires only that each Appellee's modified plan pay her unsecured creditors the liquidation value of the estate as of the effective date of her original chapter 13 plan. Section 1325(b)'s disposable income test does not apply to Appellant's proposed modifications at all.

As a matter of fact, Appellant had the burden of proof and failed to offer evidence showing that either Appellee had an increase in her ability to pay, or that either liquidation value or disposable income had increased as of the date of modification.

I. Chapter 13 Plans May Be Modified Based on an Increase or Decrease in Ability to Pay as Determined in the Discretion of the Bankruptcy Court.

A chapter 13 debtor's post-confirmation insurance settlement is grounds for modification of the chapter 13 plan if it increases the debtor's ability to pay unsecured creditors. *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008). The ability-to-pay standard has been adopted by courts of appeals in three other circuits. *See Gemeraad v. Powers*, 826 F.3d 962, 973-74 (7th Cir. 2016) ("*Gemeraad*"); *Barbosa v. Solomon*, 235 F.3d 31, 38 (1st Cir. 2000) ("*Barbosa*"); *Arnold v. Weast (In re Arnold)*, 869 F.2d 240, 244 (4th Cir. 1989) ("*Arnold*").

Section 1329(b) leaves the determination of the debtor's ability to pay to the discretion of the Bankruptcy Court. *See Gemeraad*, 826 F.3d at 973-74; *Barbosa,* 235 F.3d at 41; *In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994).

The Bankruptcy Court found that neither Appellee's insurance settlement increased her ability to pay, and the District Court affirmed the Bankruptcy Court's order based on that finding as an appropriate exercise of the Bankruptcy Court's discretion.

Appellant nevertheless contends that the Bankruptcy Court abused its discretion because, Appellant argues, the insurance settlements re-set the liquidation value and disposable income that each Appellee is required to pay unsecured creditors under Section 1325(a)(4) and Section 1325(b). Neither this Court nor any other court of appeal has ever held that these provisions re-set liquidation value or disposable income as at the date of a modification, and the language of the statute shows that there is no such re-set.

II. Section 1325(a)(4) Does Not Re-Set Liquidation Value at Modification.

In *Waldron*, this Court held that a post-confirmation insurance settlement was property of a chapter 13 debtor's estate and was therefore relevant to the debtor's ability to pay more. *In re Waldron*, 536 F.3d at 1242. But neither this Court nor any of the other circuits have held that inclusion of post-confirmation property triggers recalculation of liquidation value under Section 1325(a)(4). Instead, the statute requires a liquidation value at one and only one time: confirmation of the plan.

> (4) the value, ***as of the effective date of the plan***, of property ***to be distributed*** under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if

> the estate of the debtor were liquidated under chapter 7 of this title ***on such date***.

Section 1325(a)(4) (emphasis added).

There is only one "effective date of the plan" – the date the original plan "is confirmed and becomes binding" under Section 1327(a). *Hamilton v. Lanning*, 560 U.S. 505, 518 (2010); *see also* Sections 943(b)(5), 1129(a)(9)(A) & 1129(a)(12) (in chapter 9 and chapter 11 cases, the plan must pay administrative expense claims and trustee's fees in full "on the effective date of the plan"). "The effective date is not altered by modification of the plan, for the modified plan remains, ever constant, the plan." *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 189 (B.A.P. 8th Cir. 1997); *see also* 8 COLLIER ON BANKRUPTCY ¶ 1329.05[3] (Richard Levin & Henry J. Sommer eds., 16th ed.) (explaining that property acquired post-petition "is not relevant to [the] application of section 1325(a)(4) to a proposed plan modification" because then "a court would have to find the best-interests test to be a constantly fluctuating standard" due to "changes in the value of estate property.").

Section 1329(b) requires the plan to comply with the "requirements of Section 1325(a)", which requirements apply to the confirmation of the original plan. Modification is not confirmation, and the language of Section 1325(a)(4) therefore provides no basis for its application to a modification. Thus "the amount that would be paid" in liquidation is established as of the effective date of the original plan. *See*

8 COLLIER ON BANKRUPTCY ¶ 1325.05[2][d] (Richard Levin & Henry J. Sommer eds., 16th ed.).

Section 1328(b)(2) makes this clear, providing for discharge of a debtor who fails to complete her chapter 13 plan only if the value as of the effective date of the plan of property "actually distributed under the plan" is not less than the amount that would have been paid to unsecured creditors if the debtor had been liquidated on the effective date.

Section 1325(a)(4) likewise anchors "the effective date" at confirmation and measures the present value of distributions to be made against liquidation value "on such date." *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 & n.10 (2004); H.R. Rep. 95-595, at 408 (1977) (As used in Section 1325(a)(4), "value as of the effective date of the plan" means present value). Payments over a period of time are worth less than the one-time payment in a liquidation as of the effective date – therefore a plan that pays liquidation value over five years (as the Appellees' plans did) must pay interest on the unpaid outstanding amount. *Till*, 541 U.S. at 474. Applying Section 1325(a)(4) as of the modification date would measure liquidation value on such date against the value of "property to be distributed under the plan" – ignoring both previously-made payments and previously accrued interest. And it would compute the present value of payments that must be made as of the modification date (the "effective date" under Appellant's argument), which would require interest only for

the remaining period of the plan. Applying Section 1325(a)(4) as of the date of modification makes the section non-sensical.

Finally, applying Section 1325(a)(4) as of the modification date would make it impossible for many debtors to obtain a needed reduction in plan payments, either by lowering the total of payments required or extending them over a longer time, if their income went down or expenses went up, perhaps due to unexpected medical or other costs. Debtors seeking such modifications would have to meet a new, often more onerous requirement to pay *more* if the liquidation value were reset at the time of modification. That test would require a re-valuation of ***all*** of the debtor's non-exempt property as of that date. Mere appreciation of property from inflation would force unsustainable *increase*s in plan payments. This would doom many plans to failure in contravention of Congressional policy favoring chapter 13 over chapter 7 – a policy expressed in Section 348(f)(1)(A), which limits property of the chapter 7 estate to assets in the debtor's possession as of original chapter 13 petition, and Section 348(f)(1)(C), which limits a secured claim in the chapter 7 case to the amount allowed in the chapter 13 case. *See* H.R. Rep. No. 835, at 57 (1994) (agreeing with courts that had held that possibility of losing property acquired postpetition would be a disincentive to filing chapter 13).

Appellees argue that Section 348(f)(1)(A), which would limit their chapter 7 estates to their property at of the commencement of their chapter 13, precludes

consideration of the post-confirmation insurance settlements under section 1325(a)(4); Appellant responds that Section 348(f) applies only if Appellees actually file for chapter 7 and Section 1306 requires inclusion in the chapter 13 estate of all post-confirmation property. Appellant's argument is beside the point. Section 1325(a)(4) sets, as of the effective date, the ***amount*** that must paid under a chapter 13 plan to meet its best interests test, irrespective of what assets are in or out of the Chapter 13 estate at a later time. Section 1329(b) provides that a modification cannot reduce plan payments below that amount. A post-confirmation insurance settlement is included in property of the chapter 13 estate and the Bankruptcy Court may determine (in its discretion) whether the settlement increases the debtor's ability to pay – but it does not increase the amount payable under the best interests test, which is set as of confirmation.

III. Section 1325(b) Does Not Apply to Plan Modifications.

Section 1329(b)(1) does not refer to Section 1325(b) at all; it refers only to Section 1325(a). Appellant argues that Section 1325(a)'s introductory clause "[e]xcept as provided in subsection (b)" incorporates Section 1325(b) and its disposable income test, into Section 1329(b)(1). The precise language of the statute shows that Appellant is wrong.

Section 1329(b)(1) refers to "***the requirements*** of Section 1325(a)" – i.e., the elements the debtor must prove to confirm a plan.

By contrast, Section 1325(b) is triggered only if an unsecured creditor or chapter 13 trustee objects to the plan. Section 1325(b) provides that the debtor may overcome the objection by showing that the plan devotes the debtor's disposable income during the commitment period to the payment of unsecured claims. Section 1325(b) is a right to object and the basis for overcoming that objection – not a "requirement" for confirmation under Section 1325(a). Indeed, Section 1325(b), which gives the trustee a right to object to a plan, is textually inapposite to Section 1329, and to this case, in which the trustee is seeking modification of a plan. Section 1325(b) does not apply to plan modifications at all. This Court has never held that it does.

The legislative development of Section 1329 shows that plan modifications are not subject to Section 1325(b)'s disposable income test. When the Bankruptcy Code was first enacted in 1978, the current Section 1325(b) was not included and Section 1329 permitted only the debtor to seek modification of a plan.[3] Section 1329(b)(1) provided, as it does now, that "the requirements of Section 1325(a)" apply to plan modifications.

In 1984, Congress added Section 1325(b) (the disposable income test) and amended Section 1329 to permit the trustee or an unsecured creditor to request a

[3] Pub. L. No. 95-598 (1978).

plan modification.[4] But Congress did not amend Section 1329 to include Section 1325(b). When Congress amended Section 1329 in 2005,[5] Congress again chose not to amend Section 1329 to include Section 1325(b). As this Court has often observed, "when Congress knows how to say something but chooses not to, its silence is controlling." *Whaley v. Guillen (In re Guillen)*, 972 F.3d 1221, 1226-27 (11th Cir. 2020) (citations omitted). This Court in *Guillen* declined to read into Section 1329 a requirement of "changed circumstances" for plan modification that Congress chose not to add. *Id.* at 1229-30. The Court in these cases should decline to read into Section 1329 the "disposable income" test that Congress chose not to add. *See King v. Robenhorst (In re Robenhorst)*, No. 11-C-573, 2011 U.S. Dist. LEXIS 135688, at *7-8 (E.D. Wis. Nov. 23, 2011) (finding the "disposable income test is not part of a modification under [section] 1329."); *In re McCollum,* 363 B.R. 789, 798 (E.D. La. 2007) (court would not apply test not listed in statute); 8 COLLIER ON BANKRUPTCY ¶ 1329.03 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[B]ecause section 1325(b) is not mentioned in section 1329, except for other discrete purposes, it does not appear that section 1325(b) is applicable to modifications under section 1329.").

The statute provides further evidence that Section 1325(b)(1)(B)'s "disposable income" test does not apply to a post-confirmation insurance settlement.

[4] Pub. L. No. 98-353 (1984).

[5] Pub. L. No. 109-8 (2005).

The "disposable income" test is based on "current monthly income" derived from the six full calendar months preceding the bankruptcy, 11 U.S.C. § 101(10A)(A)(i), and therefore cannot include post-effective date insurance settlements.

Whether an insurance settlement justifies a modification is not determined by Section 1325(b) – it depends instead on whether it increased the debtor's ability to pay, as determined in the discretion of the Bankruptcy Court.

IV. The Bankruptcy Court Had Discretion to Deny Modification under 11 U.S.C. § 1329.

Appellant asserts that each Appellee's insurance settlement increased both the liquidation value of her estate and her personal income. Section 1329(a) provides that a plan "***may*** be modified" – thus showing that modification is not compelled by an increase in liquidation value or personal income. Instead, the statute gives the Bankruptcy Court discretion to approve modification if the chapter 13 trustee can show material increases in the debtor's income or non-exempt assets, and disapprove modification if the chapter 13 trustee fails to do so.

If a chapter 13 debtor's car is totaled and the insurance settlement exceeds the amount of the car loan, the debtor may need the excess to buy another car so that he can work and continue making payments under the plan. The bankruptcy court may deny a modification that would force the debtor to go car-less and unable to perform under his plan: the insurance settlement has not increased his ability to pay.

Something comparable happened to Mr. Hill. As Ms., Boutwell testified, Mr. Hill's car has a cracked windshield and his employer does not allow him to drive into the plant with a cracked windshield. He had to borrow his mother-in-law's car to go to work and he hit a deer – the repair estimate is $6,191.54.

If the debtor who lost income due to an accident is able to maintain payments under her plan thanks to the proceeds of an insurance settlement, requiring payment of the settlement amount to unsecured creditors would doom the chapter 13 plan. If the debtor maintains plan payments with family loans that she expects to repay from an insurance settlement, the plan should not be modified to pay off creditors twice – once from the loan and once from the insurance settlement. The bankruptcy court has discretion to deny such an inequitable result.

Something comparable happened to Ms. Boutwell, who had to borrow $3,500 from her parents to replace income that her husband lost in caring for her; she and her husband have completed payments under their chapter 13 plan.

If a debtor converted exempt assets to cash in order to make plan payments and thereafter received an insurance settlement, the bankruptcy court must have discretion to determine whether the use of exempt assets to make plan payments would allow the debtor to keep the subsequent insurance settlement.

V. Appellant Did Not Carry its Burden of Proof in Connection with the Motion to Modify the Chapter 13 Plans.

The statute permits modification in the discretion of the Bankruptcy Court, based on the evidence before it. As the party moving to modify the chapter 13 plan, Appellant had the burden of proof usually assigned to the debtor at a confirmation hearing. *In re Smith*, 631 B.R. 374, 377 (Bankr. D.N.J. 2021); *In re Moore*, 602 B.R. 40, 50 (Bankr. E.D. Tenn. 2019); *Skelton v. Morris (In re Morris)*, No. 11-1240, 2011 WL 7145880, at *5 (B.A.P. 9th Cir. Dec. 23, 2011).

The evidence in these cases does not support modification – Appellant did not prove that the insurance settlements increased either Appellee's ability to pay or increased the liquidation value of either Appellee's estate (even if that was relevant) over and above amounts each Appellee has already paid under her plan.

Ms. Proffitt has already paid her creditors 62.19% -- Appellant has failed to prove that her insurance settlement raised the liquidation value of her estate above 62.19%. Ms. Boutwell and Mr. Hill have already paid their creditors 40.25% -- Appellant has failed to prove that Ms. Boutwell's settlement raised the liquidation value of their estate above 40.25%.

Appellant asserts that the value of each Appellee's assets including the insurance settlements is greater on the modification date than it was on the effective date, without any evidence as to what the liquidation value was on the modification date. Appellant's argument that each Appellee failed to amend her schedules to

reflect changes in liquidation value is not evidence of value – neither Appellee had a duty to amend her schedules to show an increase or decrease in value of property she owned as of 2018 (and which she may or not have retained). Imposing such a "free standing duty" would be manifestly impractical and was explicitly rejected by this Court in *Waldron*. *In re Waldron*, 536 F.3d at 1246 ("We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty.")

Appellant did nothing more than add the insurance settlements in the respective debtors' estates to each debtor's plan payments – adding apples (plan payments out of current income) to oranges (the insurance settlement). *In re Villegas*, 573 B.R. 844, 851 (Bankr. W.D. Wash. 2017). As noted above, Section 1325(a)(4)'s best interests test does not require a recalculation of liquidation value as of the date of the modifications, but even if it did, Appellant failed to prove the facts necessary for such recalculation.

Finally, Appellant argues that the insurance settlements increased Appellees' disposable income and thus compelled modification of their plans to comply with Section 1325(b). As noted above, Section 1325(b)'s disposable income test does not apply to plan modifications – but even if it did, Appellant failed to prove an increase

in disposable income, as defined in the Code. Indeed, the Bankruptcy Court found, based on unrebutted testimony, that each debtor was living "paycheck to paycheck."

CONCLUSION

Amici respectfully submit that the orders of the courts below should be affirmed for the reasons set forth herein.

Dated: August 30, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this Amicus Brief complies with the word limitation set forth in Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this document contains 4,053 words.

2. I further certify that this document complies with the font requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 Font.

/s/ *Thomas Moers Mayer*
Thomas Moers Mayer

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of August, 2024, the foregoing was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties to this proceeding and/or serviced a copy by U.S. Mail as follows

Via Electronic Service:

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/s/ *Thomas Moers Mayer*
Thomas Moers Mayer